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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HELEN MOULTON, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B173419 (Los Angeles County Super. Ct. No. MC012362)

APPEAL from an order of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Law Offices of Rob R. Nichols, Rob R. Nichols; Law Office of Paul H. Ottosi and Paul H. Ottosi for Plaintiff and Appellant.

Law Offices of Marc J. Wodin and Mark J. Wodin for Defendant and Respondent.

INTRODUCTION

A plaintiff injured in an automobile collision brought a negligence action against the driver of the other automobile and against that driver's employer, the County of Los Angeles ("the County"), seeking to impose respondeat superior liability for its employee's acts. The trial court found that the accident did not occur within the scope of the driver's employment and granted summary judgment for the County, from which judgment plaintiff appeals. We find that plaintiff has not created a triable issue of fact as to the scope of employment and therefore respondeat superior liability should not be imposed on the County. We find that plaintiff cannot rely on a hearsay declaration to create a triable issue of fact. Because a declaration supporting plaintiff's request for a continuance for further discovery did not comply with Code of Civil Procedure section 437c, subdivision (h), we conclude that the trial court did not abuse its discretion in denying a request for continuance. We affirm the judgment.

PROCEDURAL HISTORY

On February 16, 2001, plaintiff Helen Moulton filed a complaint for property damage and personal injury naming defendants Richard D. Constantino, Michael S. Culver, and the County of Los Angeles Sheriff's Department.

On October 30, 2003, the County of Los Angeles (erroneously sued as Los Angeles County Sheriff's Department), moved for summary judgment on the ground that Culver, a County employee, did not act within the scope of his County employment at the time of the accident and therefore the County could not be held liable for Culver's torts under the respondeat superior doctrine. Moulton's opposition argued that a material issue of fact existed regarding the relationship and benefit of Culver's activities to the County. Plaintiff also requested a continuance for further discovery of facts necessary to justify plaintiff's opposition.

After granting the County's summary judgment motion, the trial court ordered judgment entered for the County on February 3, 2004. Moulton filed a notice of appeal on January 30, 2004, which we treat as valid.[1]

STANDARD OF REVIEW

A defendant moving for summary judgment bears the burden of showing that a cause of action has no merit because plaintiff cannot establish an element of the claim, or because defendant has a complete defense. The burden then shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.)

FACTS

The Sheriff's Department of the County employed Culver as a deputy sheriff. On March 8, 2000, he worked patrol out of the Palmdale Station on a 4:00 p.m. to 12:00 a.m. shift.

Culver learned that the Sheriff's Gang Enforcement Team ("G. E. T.") had job openings and applied for a G.E.T. position. The G. E. T. had offices at the Safe Streets Bureau in Rancho Dominguez. The County posted various dates to test and interview applicants. Culver chose March 8, 2000, and on that date drove to the Safe Streets Bureau in Rancho Dominguez to interview and take a written test for a G. E. T. position. He did not go to the Safe Streets Bureau to perform his regular patrol duties, and did not

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[1] The notice of appeal, filed before judgment was entered, is valid and treated as filed immediately after entry of judgment. (Cal. Rules of Court, rule 2(d)(1); *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219, fn. 6.)

wear his uniform. After taking a written test and interviewing for the G. E. T. position, Culver left at 1:00 p.m., had lunch, and drove to the Palmdale Station. While Culver traveled to the Safe Streets Bureau, while he was there, and during his lunch, the County did not pay wages or travel expenses and did not pay for his lunch.

At 3:40 to 3:50 p.m. on March 8, 2000, south of Avenue R on Sierra Highway in Palmdale, Culver was driving a 1992 Ford Ranger, which he owned. His vehicle was involved in an accident with a 1988 Jeep Cherokee driven by Constantino in which Moulton was a passenger. At the time of the accident, Culver was on his way to start his work shift at the Palmdale Sheriff's Station at 4:00 p.m.

The County did not pay Culver for his time or expenses while traveling to and from work or while taking the trip during which the accident occurred. Culver did not wear his deputy uniform at the time of the accident. He intended to change into his uniform at the Palmdale Station.

Moulton sued Constantino, Culver, and the County for injuries and damages, alleging a "motor vehicle" and a "negligence" cause of action. Moulton's complaint alleged that on March 8, 2000, Culver, acting in the course and scope of his employment by the County, negligently operated a vehicle so as to cause Moulton's injuries and damages. The County's answer, inter alia, asserted as an affirmative defense that the County was not vicariously liable for Culver's conduct because Culver was not in the scope of his County employment when the accident occurred.

Moulton's separate statement in opposition disputed some facts. Moulton disputed the County's allegation that Culver did not use his vehicle "on the job," because he traveled in his vehicle to the Safe Streets Bureau to test and interview for a G. E. T. job. Moulton disputed that Culver went to the Safe Streets Bureau to test and interview and not to perform his regular duties, and that Culver was off duty when the accident occurred; Moulton alleged that the County selected the interview and test location, posted G. E. T. jobs and qualifications on a teletype that went to everyone in the Sheriff's Department, and benefited from filling G. E. T. positions. Regarding the County's allegation that Culver came from lunch at the time of the accident, Moulton called this

allegation misleading because Culver left the Safe Streets Bureau at 1:00 p.m. to start his regular duties as a deputy at the Palmdale Station at 4:00 p.m., and stopped for lunch down the street from the Safe Streets Bureau. Regarding the County's allegations that there was no requirement that sheriff's deputies apply for G. E. T. positions and that there was no penalty for not applying, and only a small percentage of deputies applied, Moulton called these allegations misleading because to become a G. E. T. deputy an applicant had to be a Los Angeles County Sheriff's deputy, and thus the County relied on existing deputies to take tests and interviews. Moulton disputed that the County, as Culver's employer, did not receive a benefit by having him interview and test for the G. E. T. deputy position, for which Culver was later hired.

The trial court granted summary judgment on the ground that no exception to the "going and coming" rule could extend liability to the County, and Culver did not act within the scope of his employment at the time of the accident.

ISSUES

Moulton claims on appeal that:

1. The County received a benefit from Culver's action, which allowed the imposition of vicarious liability;

2. Admissions by a County employee or department raised a triable issue of fact as to whether Culver acted within the scope of his County employment; and

3. Denial of a continuance to permit discovery abused the trial court's discretion.

DISCUSSION

1. *Because Culver's Travel Was Not Within the Scope of His Employment, the County Has No Respondeat Superior Liability*

The respondeat superior doctrine makes an employer vicariously liable for torts of its employee committed within the scope of the employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296.) "[T]he determining factor in ascertaining whether an employee's act falls within the scope of his employment for respondeat superior liability is not whether the act was authorized by the employer, benefited the employer, or was performed specifically for the purpose of fulfilling the

employee's job responsibilities. [Citation.] Rather, the question is whether the risk of such an act is typical of or broadly incidental to the employer's enterprise." (*Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 481-482.)

Generally an employee " 'is not considered to be acting within the scope of employment when going to or coming from his or her place of work.' " (*Tognazzini v. San Luis Coastal Unified School Dist*. (2001) 86 Cal.App.4th 1053, 1057.) An employee, however, is considered to act within the scope of employment while on a special errand, either as part of his regular duties or at his employer's specific order or request, because the errand benefits the employer. Unless the facts are undisputed, whether a tort occurred within the scope of employment is a question of fact. (*Ibid*.)

It is undisputed that when the accident happened, Culver was not on duty in his job as a sheriff's deputy, was not performing sheriff's deputy work, and was not wearing his uniform. His shift started later, at 4:00 p.m. He drove a car he owned, rather than a car owned by the Sheriff's Department. The Sheriff's Department was not paying Culver employment compensation or travel expenses when the accident happened. Culver was not driving to accomplish a special errand for his employer, either as part of his regular duties or at the Sheriff's Department's specific order or request. These facts show that Culver was not acting within the scope of his employment when the accident occurred.

Moulton concedes that when traveling to and from work, an employee does not act within the scope of employment. Moulton argues, however, that when an employer derives a benefit from the employee's travel to or from work, the law recognizes an exception. Moulton relies on two cases. Neither applies to this appeal.

First, in *Boynton v. McKales* (1956) 139 Cal.App.2d 777, the plaintiff, standing at night next to his parked car, was hit and seriously injured by the car Brooks drove as he returned home from a banquet given by his corporate employer, McKales. (*Id*. at p. 780.) The question was whether corporate employer McKales had respondeat superior liability for its employee's act. McKales argued that Brooks attended the banquet for pleasure as a purely social function, without any compulsion from the employer. Therefore McKale argued that the "going and coming rule" exempted it from liability and the "special

errand" rule did not apply. (*Id*. at pp. 788-789.) Under the "special errand" rule, if an employee is coming from or returning to his home "on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." (*Id*. at p. 789.) "The attendance at a social function, although not forming part of the normal duties of the employee, may come under the 'special errand rule' if the function or the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend." (*Ibid*.) McKales hosted the banquet annually to recognize lengthy employment with the corporation. The district manager and vice-president in charge of sales signed invitations. All but one or two of the 33 employees invited attended. Employees' families were not invited. Seven representatives of firms whose products McKales sold attended the banquet. *Boynton* concluded that this evidence showed the banquet was "an official company function with close relation to its sales program and intended to benefit the company by increase in the continuity of employment [citation] the attendance at which was at least expected from the employees." (*Id*. at p. 791.) Thus the special errand rule supported a judgment that McKale was vicariously liable under respondeat superior for Brooks's negligence.

Culver's travel to test and interview for a job does not resemble attendance at a company function, closely related to a company sales program and intended to benefit the company by increasing continuity of employment. That the Sheriff's Department limited applicants to current sheriff's deputies does not alter this conclusion; no evidence shows that the Sheriff's Department ordered, compelled, or expected Culver to apply for the job opening. He was employed to work as a deputy sheriff, not to apply for other department jobs. Culver himself decided to apply and to schedule his test and interview, which took place during non-working hours. He arranged his own transportation. His job application and travel to interview and test did not constitute the "attendance . . . connected with the employment and for a material part intended to benefit the employer

who requested . . . the employee to attend" which would bring the County within the "special errand rule." (*Boynton v. McKales, supra,* 139 Cal.App.2d at p. 789.)

Second Moulton cites *Temple v. Southern Pac. Transportation Co*. (1980) 105 Cal.App.3d 988, in which Southern Pacific Transportation Company employed plaintiff Temple as a railroad brakeman on a freight train running from San Luis Obispo to Watsonville and back. The Hours of Service Act (45 U.S.C. § 61 et seq.) required a train crew to "layover" at the train's destination for eight or more hours before the train left for its return trip. Southern Pacific provided transportation to its rail yard from Watsonville, but permitted crew members to maintain their own vehicles in the company yard. Railroad employees' time was their own during a layover, but when a layover ended employees were required to inform the company dispatcher where to reach them, were subject to the company's orders, and had to wait for a call to return to work. After a layover on September 19, 1973, while driving himself, Temple, and another crew member to the Southern Pacific rail yard, Shannon collided with another vehicle, injuring plaintiff Temple. Temple sued Southern Pacific, contending that he sustained his injuries within the scope of his, and Shannon's, employment. (*Temple,* at pp. 990-991.)

Temple analyzed whether, at the end of the layover period, plaintiff and Shannon had resumed their employment. It relied on the rule that an employee acts within the scope of employment when engaged in work he was employed to perform, " ' "or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or conveniences[.]" ' " (*Temple v. Southern Pac. Transportation Co., supra,* 105 Cal.App.3d at p. 993, italics omitted.) *Temple* concluded that when their layover ended, plaintiff and Shannon responded to the employer's call to return to work by driving to the railroad yard, and thus could be deemed to have acted within the scope of their employment. (*Id.* at p. 994.) Thus a triable issue of fact existed and required reversal of summary judgment granted for Southern Pacific. (*Id*. at pp. 995-996.)

Culver did not travel under a County order. Unlike passengers in Shannon's car, whom the employer had summoned back to the rail yard to work, Culver traveled to

apply for a job on his own time and returned to his workplace to start his shift at the customary time, not in response to his employer's order or summons.

Neither *Temple* nor *Boynton* persuade us that Culver's travel to and from a site where he took a test and had a job interview qualified as a "special errand" or provided a "special benefit" to his employer. Culver's travel on March 8, 2000, was not undertaken at his employer's request, order, compulsion, or expectation, and was not intended to benefit the County. The trial court correctly granted summary judgment for the County.

2. *Culver's Declaration Was Inadmissible Hearsay*

Moulton claims on appeal that a declaration Culver submitted as part of his opposition to the County's summary judgment motion created a triable issue of fact as to whether Culver's travel was within the scope of his employment. We disagree.

First, Culver's declaration was not part of *Moulton*'s opposition to the summary judgment motion. Moulton's opposition and separate statement did not cite or rely on Culver's declaration. A fact not stated in the separate statement may be disregarded. (*Fleet v. CBS, Inc*. (1996) 50 Cal.App.4th 1911, 1916, fn. 3; *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.)

Second, since Moulton raised this theory for the first time on appeal, this court need not consider it. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

Third, the statements in the Culver declaration are hearsay. Culver's declaration states: "I was advised by my supervisor after the accident that is the subject of this litigation that at the time of the accident I was in the course and scope of my employment with the Sheriff's Department. [¶] Subsequently, I was advised by the Sheriff's Department's claims department that I was in the course and scope of my employment with the Sheriff's Department at the time of the accident."

Moulton argues that these statements constitute an exception to the rule against hearsay as authorized admissions under Evidence Code section 1222. Moulton, however, failed to satisfy the requirements of this statute, which states:

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

"(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

"(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

Moulton failed to provide the trial court with any evidence in the declaration itself or from some independent source which would be "sufficient to sustain a finding of such authority," and thus provided no foundational showing that the unidentified hearsay declarants were authorized to speak on behalf of the defendant. (*Rochlis v. Walt Disney Co*. (1993) 19 Cal.App.4th 201, 217, overruled on other grounds, *Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1251.) Evidence Code section 1222 thus provides no exception to the prohibition against admission of this hearsay evidence. (*Westman v. Clifton's Brookdale, Inc*. (1948) 89 Cal.App.2d 307, 311.)

3. *Denial of the Request for Continuance Was Not an Abuse of Discretion*

Moulton claims that the trial court abused its discretion in denying a continuance to perform discovery. Moulton's opposition to the summary judgment motion stated that the Law Offices of De Simone & Huxster had only recently become Moulton's counsel of record, that counsel learned no discovery was propounded to the County, and associate counsel immediately propounded discovery and proposed further discovery. The request for a continuance stated: "It is anticipated that the discovery will clearly establish that the County/Department obtained a benefit from Culver's activities on the date in question. To argue otherwise would seem disingenuous. [¶] The County/Department only hired G.E.T. deputes from among the deputies, with two years experience, in their own department. Likewise, through the activities of Culver on the date of the incident giving rise to this lawsuit they determined that Culver was in fact one of the qualified deputies and hired him for the G.E.T. position."

More specifically, De Simone's declaration stated that he anticipated "additional discovery will establish that the County received an incidental benefit by having their deputies travel to the East Rancho Dominguez location in order to test and submit to oral interviews to be transferred to the Gang Enforcement Team. Since the County had posted a 'department wide' teletype seeking to have deputies apply for this position, there clearly was an expectation that individuals would travel to the East Rancho Dominguez facility in order to take the necessary written tests and submit to the necessary oral interview so that they could be placed as a deputy on the Gang Enforcement Team. This was obviously a benefit to the County/Department." (Italics omitted.)

A continuance is mandatory if conditions in Code of Civil Procedure section 437c, subdivision (h) are met. Affidavits must show: (1) the facts to be obtained are essential to opposing the summary judgment motion; (2) there is reason to believe that such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623; see also *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 770-771.) The trial court has discretion whether to grant a continuance to conduct discovery. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.)

The record already contained Culver's deposition testimony that the Sheriff's Department posted G.E.T. job openings "department wide." De Simone's declaration does not establish that there is reason to believe that facts to be obtained in further discovery may exist. The declaration does not state what witnesses Moulton would depose, or what evidence Moulton would seek to have the County produce, which would lead to facts establishing that the County received a benefit from deputies' travel to the Rancho Dominguez facility for tests and interviews, sufficient to show that Culver's conduct on March 8, 2000, was within the scope of his employment. A party does not satisfy the statute merely by stating that additional discovery or investigation is contemplated; the statute requires a party moving for a continuance to show "facts essential to justify opposition may exist." (Code Civ. Proc., § 437c, subd. (h); *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) The purpose of the affidavit required by the summary judgment statute is to inform the court of outstanding discovery necessary to

resist the summary judgment motion. (*Scott v. CIBA Vision Corp*. (1995) 38 Cal.App.4th 307, 325.) Plaintiff had to show by affidavit that the discovery requested could reasonably lead to evidence necessary to refute the showing made in the summary judgment motion. (*Id*. at p. 326.)

De Simone's affidavit did not meet the requirements of section 473c, subdivision (h). Therefore denial of the request did not abuse the trial court's discretion.

DISPOSITION

The judgment is affirmed. Costs on appeal awarded to the County of Los Angeles.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.